

THE LAW OF REFUGEE STATUS

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The Law of Refugee Status

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Preface

A Convention refugee is a person who is outside her¹ country because she reasonably believes that her civil or political status puts her at risk of serious harm in that country, and that her own government cannot or will not protect her.

The Convention refugee definition is of singular importance because it has been subscribed to by more than one hundred nations in the only refugee accords of global scope. Many nations have also chosen to import this standard into their domestic immigration legislation as the basis upon which asylum and other protection decisions are made.

Yet this legal definition of a refugee is at odds with the ordinary, social perception of refugee status. We commonly refer to persons who have been forced to flee to another region of their country as refugees. We normally assume that a person who is prepared to abandon her home, her family, her security is a refugee, without inquiring into the accuracy of the concerns which cause her to flee. We recognize the logic of escape from natural disasters, or from generally oppressive political regimes as much as from the possibility of persecution. Too, our sense of compassion drives us to relieve the suffering of involuntary migrants without first conducting a detailed inquiry into the circumstances which gave rise to their distress, or the reasons that a return home or a prolonged stay in a country of first asylum are untenable.

This book is an attempt to explain the scope of the Convention refugee definition as drafted, and as it has evolved in practice. While this definition was not intended to, and does not in fact, address the whole range of concerns which prompt involuntary migration, a generous interpretation of the Convention can go some distance to meeting the needs of at least the most acutely at risk populations outside the borders of their own nation. It remains tragically true that international human rights law — the intended means of permitting the world community to respond to wrongs committed by a country within its own territory — has not been permitted to evolve to a state of genuine efficacy.

¹ Pronouns herein are phrased in the feminine voice in recognition of the fact that "refugee women and girls constitute the majority of the world refugee population, and that many of them are exposed to special problems in the international protection field": Executive Committee of the UNHCR Programme, Conclusion No. 39 (1985).

The Convention refugee definition may be viewed as comprising five essential elements, each of which must be established before status is appropriately recognized. Following an introduction to the development of the international refugee definition in Chapter 1, this book addresses each of these five criteria in a distinct chapter.

The first essential definitional element, comprehending a range of contextual concerns, is referred to here as *alienage*. The Convention definition includes only persons who have left their country of nationality, or in the case of stateless persons, their country of former habitual residence. This criterion raises several related questions of claims grounded in post-departure events; the relevance of official authorization to emigrate; so-called direct flight requirements which suggest a duty to seek protection in the first potential state of refuge; the implication of entry into an asylum state in contravention of applicable immigration laws; and the means by which the country of reference for a particular refugee claim is defined. Each of these concerns is examined in detail in Chapter 2.

Second, the refugee claimant must be *genuinely at risk*. It is not enough that she truly believe herself to be in jeopardy. Rather, there must be objective facts to provide a concrete foundation for the concern which induces her to seek protection in another state. Chapter 3 addresses the historical and practical reasons which underpin the Convention's focus on the prospective assessment of objective risk, and its exclusion of claims based on purely subjective apprehensions. The nature of the threshold test, as well as the means of establishing this objective risk — including consideration of human rights data, the claimant's own testimony, and evidence of harm to persons similarly situated — are canvassed in detail.

Third, the claimant's flight must be motivated by the prospect of "persecution", that is, *risk of serious harm* against which the state of origin is *unwilling or unable to offer protection*. Chapter 4 defines this serious harm as the sustained or systemic violation of core, internationally recognized human rights. The nature of both civil and political rights and socio-economic human rights is addressed, and the distinction is drawn between the violation of human rights and generalized hardship or lack of opportunity. Most important, this chapter attempts to explain the nature of a state's duty to protect its population, failure of which is at the heart of refugee protection. This leads to a consideration of state accountability for the actions of non-official persecutors, and responsibility for localized failure to protect.

Fourth, the risk faced by the refugee claimant must have some nexus to her race, religion, nationality, membership in a particular social group, or political opinion. The critical question is whether but for her *civil or political status* she could reasonably be said to be at risk of serious harm. The meaning of each of the recognized forms of civil and political status is examined in Chapter 5. In particular, this chapter looks to issues of unexpressed political opinions, and of political opinion implicit in conduct. The malleability of the social group criterion is canvassed in relation to issues of gen-

der, sexual orientation, family, class or caste, and membership in voluntary associations. Finally, the compatibility of the civil or political status requirement with claims grounded in criminal status, refusal to perform military service, and flight from war or violence is explored.

Fifth and finally, there must be a genuine need for and legitimate claim to protection. The *cessation* clauses of the Convention provide that refugee status is not warranted if the refugee can either reclaim the protection of her own state, or has secured an alternative form of enduring protection. The *exclusion* clauses ensure that serious criminals and persons whose actions have exhibited disregard for basic norms of human dignity cannot invoke international protection. Chapter 6 looks at each of the cessation and exclusion clauses in detail, in an effort clearly to delineate the recognized exceptions to the duty of protection.

The examination of each of the five essential elements of the Convention definition draws on three sources. First, the drafting history of the Convention is canvassed as a means of understanding the intentions which underlie the protection regime. Second, the views of legal and other scholars who have informed the development of refugee law are presented. Third, the rich refugee jurisprudence developed in Canada since the incorporation of the Convention definition into domestic law in 1973 is employed to illustrate the Convention's actual and potential scope. The approximately 3000 judgments of the Supreme Court of Canada, Federal Court of Appeal, and Immigration Appeal Board considered in preparing this book have proved invaluable to the development of a contextual understanding of the definition. The caselaw was surveyed to January 1, 1989, with the exception of superior court judgments and decisions of the new Immigration and Refugee Board relating to exclusion and cessation (which clauses were incorporated in Canadian law only as of January 1, 1989), which have been considered to July 1, 1990. Judgments of determination authorities in other countries are drawn upon only very selectively, particularly in relation to aspects of the definition not yet adequately elaborated in Canadian law. All of these sources are extensively footnoted in response to the concerns expressed to me by many scholars, practitioners, and decision-makers, that there was a need for a consolidation in one volume of the best of the relevant international legal materials, scholarship, and caselaw.

I have benefitted from an extraordinary support structure over the several years during which this book was in preparation. The Canadian Law Information Council generously provided core research funding, supplemented by assistance from the United Nations High Commissioner for Refugees. Deans John McCamus and Jim MacPherson and Executive Officer Norma Doran of the Osgoode Hall Law School were instrumental in providing me the opportunity and facilities to realize this project. The staff of the York University Law Library — in particular, Maureen Boyce, Norma Eakin, and Marianne Rogers — never failed to track down whatever obscure document or reference I needed to consider. George Gonsalves, Terri Offen, Wendy

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While preparing this book, I have been privileged to work with the members, legal staff, and hearing officers of Canada's new Immigration and Refugee Board. The somewhat intimidating, but always rewarding, experience of training those who will make the law has convinced me that the fair-minded and conscientious application of the Convention definition can go a substantial distance toward reinvigorating the highly imperfect international protection regime.

My final and particular appreciation is to Lisa Gilad, social anthropologist and author, now refugee decision-maker, who provided frequent commiserations during the writing phase, and who generously and carefully reviewed my final draft; and to John Moreau, whose patient support and caring sustained my resolve to complete this project.

Toronto
August, 1990

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2.3	Choice of the Country of Asylum	46
2.4	Illegal Entry or Stay in an Asylum State	50
2.5	Determining the State of Reference	55
2.5.1	Persons with Dual or Multiple Nationality	57
2.5.2	Stateless Persons	59
3	Well-Founded Fear	65
3.1	Fear: The Requirement for Prospective Assessment of Risk ..	66
3.1.1	Historical Foundation of the Prospective Risk Requirement	66
3.1.2	The Practical Imperative for Prospective Assessment of Risk	69
3.1.3	Subjective Fear as a Negative Constraint on the “Objective Trump”	70
3.1.4	Fear as an Aspect of the Objective Assessment of Risk	74
3.2	Well-Founded Assessment of Risk: Stating the Test	75
3.2.1	Relevance of General Evidence of Respect for Human Rights	80
3.2.2	Role of the Refugee Claimant’s Testimony	83
3.2.3	Evidence of Individualized Past Persecution	87
3.2.4	Evidence of Harm to Persons Similarly Situated	89
3.2.5	Assessing Risk Within the Context of Generalized Oppression	90
4	Persecution	99
4.1	Persecution as the Sustained or Systemic Violation of Basic Human Rights Resulting from a Failure of State Protection ..	101
4.2	The Nature of a State’s Duty of Protection	105
4.3	Risk to Civil and Political Rights	112
4.4	Risk to Economic, Social, and Cultural Rights	116
4.4.1	Persecution Distinguished from Hardship	117
4.4.2	Defining a Breach of Economic, Social, or Cultural Rights	119
4.5	Failure of the State’s Duty to Protect Basic Human Rights ...	124
4.5.1	Agents of Persecution	125
4.5.2	Regionalized Failure to Protect	133
5	Nexus to Civil or Political Status	135
5.1	Race	141

5.2	Nationality	144
5.3	Religion	145
5.4	Political Opinion	149
5.4.1	Unexpressed Political Opinion	149
5.4.2	Political Opinion Implicit in Conduct	152
5.5	Membership of a Particular Social Group	157
5.5.1	Gender	162
5.5.2	Sexual Orientation	163
5.5.3	Family	164
5.5.4	Class or Caste	166
5.5.5	Voluntary Associations	167
5.6	Other Grounds for Claiming Refugee Status	169
5.6.1	Criminal Status: Prosecution or Persecution?	169
5.6.2	Refusal to Perform Military Service	179
5.6.3	Victims of War and Violence	185
6	Cessation and Exclusion	189
6.1	Persons Who Have Regained the Protection of Their State of Origin	191
6.1.1	Voluntary Re-availment of National Protection	192
6.1.2	Voluntary Re-acquisition of Nationality	196
6.1.3	Voluntary Re-establishment in the Country in Which Persecution was Feared	197
6.1.4	Change of Circumstances	199
6.2	Persons Who Benefit from Surrogate National or International Protection	205
6.2.1	United Nations Protection or Assistance	205
6.2.2	Acquisition of a New Nationality	209
6.2.3	Residence with the Rights and Obligations of a National	211
6.3	Persons Who Do Not Deserve Protection	214
6.3.1	Crimes Against Peace and Security	215
6.3.2	Serious Non-Political Crimes	221
6.3.3	Acts Contrary to the Principles and Purposes of the United Nations	226
7	The Challenge of Humane Protection in a Self-Interested World	231
	<i>Bibliography</i>	235
	<i>Index</i>	243

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A

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Abubeker, Teum Mehamed, I.A.B.D. V76-6125, Aug. 26, 1977	63
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Adetuyi, Jones Adeniji, I.A.B.D. 79-9057, March 5, 1979	143
Adjei, Joseph v. M.E.I. (1989), 7 Imm. L.R. (2d) 169 (F.C.A.)	70, 79, 95, 96
Adjei, Yaw Owusu, F.C.A.D. A-498-81, Feb. 25, 1982	155
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Aguillar Martinez, Noe, I.A.B.D. M80-1145, Nov. 20, 1980	113
Ahmad, Owais Uddin, I.A.B.D. 79-1197, Nov. 21, 1979	143
Ahmaddy, Basir Ahmad, I.A.B.D. T86-10392, Dec. 1, 1987	184
Ahmed, Saad Uddiz, I.A.B.D. T86-10366, Aug. 26, 1987	202
Ajodhia, Vidya, I.A.B.D. M85-1709, Nov. 12, 1987	86, 124
Ajwal Singh, Shaugin, I.A.B.D. V87-6244X, June 16, 1987	102
Ali, Abdi Mohamed, I.A.B.D. T87-9585, Feb. 14, 1989	85
Almeida, Graciano de Jesus de, I.A.B.D. T87-9819X, Jan. 7, 1988	84
Al-Shanti, Tawfiq Mohammed Tawfiq, I.A.B.D. 79-9055, April 5, 1979	73

Alvarenga, Adan Jeronimo, I.A.B.D. M87-1081, May 20, 1987	112, 187
Amara de Carvalho, Carlos Fernando, I.A.B.D. 77-1071, May 19, 1977	58
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Amazan, Jean Robert, I.A.B.D. M87-1502X, Dec. 7, 1987	167
Amjadishad, Rouzbeh, I.A.B.D. M85-1935, May 13, 1987	70, 72
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Appiah Asamoah, Anthony, I.A.B.D. T87-9902, Jan. 19, 1988	48, 170
Aranda Diaz, Romilio Dictmart, I.A.B.D. V80-6225, C.L.I.C. Notes 23.7, July 30, 1980; affd. on other grounds F.C.A.D. A-588-80, March 20, 1981	114, 153
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Arqueta v. I.N.S., 759 F.2d 1395 (9th Cir. 1985)	156
Arriagada Lopez, Mireya del Carmen, I.A.B.D. 77-9216, May 31, 1977	63
Arshad, Ghouse Mahmood Khan, I.A.B.D. 81-9474, Sept. 18, 1981	123
Asnake, Askale, I.A.B.D. M80-1020, C.L.I.C. Notes 31.10, Feb. 23, 1981	165
Attakora, Benjamin v. M.E.I., F.C.A.D. A1091-87, May 19, 1989; revg. I.A.B.D. T86-10336X, Oct. 14, 1987	43, 81, 85
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Atwal Singh, Shaugin, I.A.B.D. V87-6244X, June 16, 1987	102
Augustyn, Teresa, I.A.B.D. T81-9103, March 18, 1981	146, 147

B

Bahamondes Peralta, Moise Danilo, I.A.B.D. 79-1082, C.L.I.C. Notes 18.9, Dec. 12, 1979	101, 154
Bakr Mohamed, Adel Mohammed, I.A.B.D. V87-6168, Nov. 18, 1988	145
Baksh, Oumar, I.A.B.D. T83-10588, Jan. 18, 1984	143
Bala, Leczek Franciszek, I.A.B.D. V81-6136, May 11, 1981	146, 147
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Bellefleur, Joseph Vester, I.A.B.D. M87-1593X, Sept. 1, 1987... ..	92, 97
Benhene, Charles, I.A.B.D. M87-1609X, Jan. 20, 1988	77
Bhopal Singh, Santok, I.A.B.D. V87-6245X, Aug. 17, 1987	35, 52
Bilaspuri Singh, Boota, I.A.B.D. V87-6150X, May 19, 1987	147
Billias, Panagiotis, I.A.B.D. 79-1166, C.L.I.C. Notes 27.10, July 7, 1980	147
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Buk, Boguslaw, I.A.B.D. V80-6188, June 12, 1980	148

C

Cardoza-Fonseca. <i>See</i> I.N.S. v. Cardoza-Fonseca	
Carneiro de Oliveira, Luis Folhadela, I.A.B.D. 75-10382, April 20, 1976	166
Casado Molina, David Ignacio, I.A.B.D. M83-1028, April 13, 1983	102
Chang Tak Hue, Marcel Simon v. M.E.I., F.C.A.D. A-196-87, March 8, 1988; revg. I.A.B.D. M87-1079X, March 25, 1987	49, 73
Chaudri, Tahir Ahmad Nawaz v. M.E.I. (1986), 69 N.R. 114 (F.C.A.); revg. I.A.B.D. T82-10012, Oct. 23, 1984	34, 89, 156
Chaudry, Amjad Ali, I.A.B.D. M82-1160, Sept. 29, 1982	70
Chonta Gallegos, Gilberto, I.A.B.D. M83-1588, Jan. 25, 1984	70
Chowdhury, Akrimul Huque v. Deputy A.G. Canada, F.C.A.D. A-468-87, May 12, 1988	149, 155
Chowdhury, Mahibur Rahman, I.A.B.D. T83-10497, C.L.I.C. Notes 90.8, Feb. 13, 1986	172, 202
Chopra, Raman Kumar, I.A.B.D. M83-1196, Nov. 7, 1983	114
Colima Acuna, Jaime Vladimiro, I.A.B.D. 80-9125	85
Contreras Gutierrez, Hector Eduardo, I.A.B.D. V80-6220, C.L.I.C. Notes 30.11, March 16, 1981	87, 114, 151, 173
Corcuera Guzman, Grimaldo Remigio, I.A.B.D. M82-1265, Sept. 30, 1983	115
Cordova Segnel, Fernando Alejandro, I.A.B.D. 76-1157, Aug. 11, 1977	91, 113
Coriolan v. I.N.S., 559 F. 2d 993 (5th Cir. 1977)	40, 156

Correia, Antonio, I.A.B.D. 75-10245, April 5, 1976	139
Costa, Antonio Pereira, I.A.B.D. T87-9107X, July 16, 1987	81
Costa de Carvalho, Jose Manuel, I.A.B.D. T77-9040, Feb. 10, 1977	58
Cripaul, Daniel, I.A.B.D. M81-1106, June 4, 1981	127
Cruz, Jose Manuel Elias da, I.A.B.D. T87-9255X, Oct. 27, 1987...	84
Cruz, Oscar Roberto, I.A.B.D. V83-6807, June 27, 1986	86, 162
Cuevas Fuente, Juan de la Cruz, I.A.B.D. 79-1117, Aug. 28, 1979	127
Cylien, Marc Michel, I.A.B.D. 73-12462, March 21, 1974.....	118, 152

D

da Costa, Americo Antonio, I.A.B.D. 76-9401, Aug. 26, 1976	58
Dan-Ash, Tayshir, I.A.B.D. M86-1420, Oct. 20, 1986; revd. on procedural grounds F.C.A.D. A-655-86, June 21, 1988	155, 176
Dankha, Esshak, Conseil d'Etat de France, Decision No. 42.074, May 27, 1983	127
Dankha, Mikieal L., I.A.B.D. V82-6160, C.L.I.C. Notes 46.10, Aug. 12, 1982	147
Darko, George Goka, I.A.B.D. T87-9173X, June 16, 1987	173
Darwich, Hassan, I.A.B.D. 77-3038, May 20, 1977; affd. (1978), 25 N.R. 462 (<i>sub nom.</i> Darwich v. M.E.I.) (F.C.A.)	187, 188
Delva, Jean-Claude, I.A.B.D. 74-1091, Dec. 31, 1974	42
Dembil, Cumhur, I.A.B.D. M82-1275, Jan. 6, 1983	77
Dembil, Hassan Ahmed Ali, I.A.B.D. 80-1026, May 21, 1982	57
Dembil, Ismail Hassan, I.A.B.D. M80-1018, March 7, 1980; revd. on other grounds F.C.A.D. A-163-80, Sept. 30, 1980; I.A.B.D. May 21, 1982	57, 94, 187
Dembil, Zahara Hassan, I.A.B.D. 80-1025, May 21, 1982	57
Demir, Orhan, I.A.B.D. M82-1274, Jan. 6, 1983	87, 147
Desir v. Ilchert, 840 F. 2d 723 (9th Cir. 1988)	121, 156
Dhaliwal Singh, Banta, I.A.B.D. M87-6103X, April 30, 1987	74
Dhaliwal Singh, Jit, I.A.B.D. T85-9358, June 8, 1987	125
Dhillon Singh, Harjinder, I.A.B.D. T84-9040, Oct. 21, 1985	48, 52, 73
Diaz, Juan Pedro, I.A.B.D. M87-1417X, July 27, 1987	201
Diaz Duran, Oscar Manuel, I.A.B.D. 80-9116, April 16, 1980; affd. on other grounds (1982), 42 N.R. 342 (<i>sub nom.</i> Diaz Duran v. M.E.I.) (F.C.A.)	45, 54, 72
Diaz Fuentes, Guillermo Lautaro, (1974), 9 I.A.C. 323; affd. on other grounds (1974), 52 D.L.R. (3d) 463 (F.C.A.) (<i>sub nom.</i> M.E.I. v. Fuentes) (F.C.A.)	71, 87, 119
Drouskas, Theodosius, I.A.B.D. 79-1055, C.L.I.C. Notes 11.18, Oct. 11, 1979	147
Drozd, Viatcheslav, and Drozd, Tatiana, I.A.B.D. T79-9395 and T79-9395, C.L.I.C. Notes 18.12, March 6, 1980	42

Duarte, Agostinho de Oliveira, I.A.B.D. 76-9051, Feb. 6, 1976	58
Dytlow, Boleslaw, I.A.B.D. V87-6040X, July 7, 1987; affd. F.C.A.D. A-569-87, April 13, 1988	142, 143
Dytlow, Robert, I.A.B.D. V87-6521X, Jan. 5, 1988	143
Dytlow, Stanislaw, and Pawlowska, Krystyna, I.A.B.D. V86-6268/6270, Dec. 28, 1988	142, 143
Dytlow, Sylvia and Patrycyca, I.A.B.D. V87-6361X, Oct. 29, 1987	70, 142, 143

E

Easwaramoorthy, Krishnapillai, I.A.B.D. T82-9736, June 18, 1984; affd. F.C.A.D. A-874-84, Feb. 7, 1986; leave to appeal to S.C.C. refused May 26, 1986	143, 178
El Arabi, Rashed Mohamed Mahmoud, I.A.B.D. 74-10409, Jan. 29, 1975	91
El Chedraoui, Elias, I.A.B.D. M81-1296, Feb. 10, 1982	187
Espinosa Astudillo, Leonardo Arturo v. M.E.I. (1979), 31 N.R. 121 (F.C.A.); setting aside I.A.B.D. 78-9178, Nov. 16, 1978....	154, 164
Esteves, Dionisio Nunes, I.A.B.D. T87-9304X, Sept. 15, 1987	140
Ezambe, Henrie, I.A.B.D. M87-1106, June 9, 1987	84

F

Fedorenko v. United States, 449 U.S. 490 (U.S.S.C. 1981)	220
Fernandez Ortigoza, Mario Arturo, I.A.B.D. V83-6704, Jan. 26, 1987	155
Ferreira, Fernando, I.A.B.D. M83-1097, C.L.I.C. Notes 68.5, July 18, 1984	190
Ficciella Munizaga, Jose Salvador, I.A.B.D. 79-1222, C.L.I.C. Notes 14.14, Dec. 13, 1979	119
Florkowski, Boguslawa, I.A.B.D. 79-9375, C.L.I.C. Notes 19.6, April 14, 1980	193
Fogel v. M.M.I. (1976), 7 N.R. 172 (F.C.A.)	172
Forbes v. Lloyd Oswald, M.E.I., F.C.A.D. A-655-83, Nov. 8, 1983	52
Frimpong, Joseph Manso, I.A.B.D. T87-10043X, Oct. 29, 1987....	81
Fuentes Leiva, Mario Benito, I.A.B.D. 79-9101, April 5, 1979; C.L.I.C. Notes 27.12, Nov. 13, 1989.....	72, 85

G

Gabriel, Emeline, I.A.B.D. M86-1128, C.L.I.C. Notes 105.13, March 10, 1987	158, 169
Galvis de Cardona, Marina, I.A.B.D. 77-1120, Aug. 2, 1978	150
Garcia Zavala, Raul, I.A.B.D. 81-1222, C.L.I.C. Notes 45.10, June 29, 1982	72, 202

Ghebreiyesus, Kidane, I.A.B.D. 79-1137, C.L.I.C. Notes 20.3, March 21, 1980	34, 112, 187
Ghuman Singh, Jagir, I.A.B.D. T82-9689, Oct. 25, 1982	85
Gill, Palwinder-Kaur, I.A.B.D. V86-6012, July 11, 1986; affd. F.C.A.D. A-476-86, Jan. 2, 1987	53, 203
Gill Singh, Bakhshish, I.A.B.D. V87-6246X, July 22, 1987	45, 53, 71, 153
Gill Singh, Harpal, I.A.B.D. T83-10185, Dec. 12, 1983	113
Gill Singh, Jagdish, I.A.B.D. V86-6351X, April 22, 1987	72
Gill Singh, Lakhbir, I.A.B.D. V83-6279, Feb. 13, 1986	35
Gillen, James Patrick, I.A.B.D. T83-9750, Aug. 15, 1984	59
Giraud, St. Gardien, I.A.B.D. T81-9669, C.L.I.C. Notes 48.10, Oct. 28, 1982; revd. on other grounds F.C.A.D. A-1080-82, Sept. 30, 1983; I.A.B.D. March 20, 1986	52, 221
Golder v. United Kingdom (1975), 1 E.H.R.R. 524	107
Gonzales, Ruiz Angel Jesus, I.A.B.D. T81-9746, C.L.I.C. Notes 50.7, Nov. 8, 1982	200, 201
Gonzalez Galindo, Francisco Humberto v. M.E.I., [1981] 2 F.C. 781 (C.A.)	88, 155
Gozdalski, Tomasz, I.A.B.D. M87-1027X, April 23, 1987	122, 148
Grochowska, Urszula, I.A.B.D. V84-6217, Oct. 24, 1984	124
Gudiel Medina, Mario Roberto, I.A.B.D. V83-6313, C.L.I.C. Notes 69.2, March 28, 1984	155
Guerra Morales, Carlos Armando, I.A.B.D. 76-1057, March 10, 1977	36
H	
Haidekker, Magdolna, (1977), 11 I.A.C. 442	63
Harmaty, Gregor Steven (1976), 11 I.A.C. 202	63
Heer Singh, Karnail, I.A.B.D. V87-6167X, June 3, 1987; affd. F.C.A.D. A-474-87, April 13, 1988	173
Hernandez, Gladys Maribel, I.A.B.D. M81-1212, Jan. 6, 1983; revg. F.C.A.D., May 20, 1982	102, 152, 168
Hernandez Ortiz v. I.N.S., 777 F. 2d 509 (9th Cir. 1985)	156
Hidalgo, Fernando Segundo, I.A.B.D. 74-10354, Jan. 29, 1975; revd. on other grounds F.C.A.D. A-71-75, May 26, 1975; rejected by Board Sept. 16, 1975	48
Horbal, Frantisek, I.A.B.D. T77-9138, April 27, 1977	43
Hossan, Mohamed Anwar, I.A.B.D. M84-1277, Nov. 14, 1984	91
Hossein, Abu Sayeed Mohammed Javed, I.A.B.D. M87-1040X, April 30, 1987	85
Hubicki, Slawomir Krzystof, I.A.B.D. 81-6325, Oct. 19, 1981	39
Hui, Hua Kien, I.A.B.D. V87-6081X, July 21, 1987	122

Hurt, Waclaw Antoni Michael v. M.M.I., [1978] 2 F.C. 340, 21 N.R. 525 (C.A.); revg. I.A.B.D. T77-9105, March 29, 1977	56, 213
---	---------

I

Ictensev, Ethem, I.A.B.D. T87-9494X, Oct. 19, 1987	171
I.N.S. v. Cardoza-Fonseca, 467 U.S. 407 (U.S.S.C., 1987)	77, 78
Inciriyan, Zekiye, I.A.B.D. M87-1541X, Aug. 10, 1987	162
Inzunza Orellana, Ricardo Andres, and M.E.I., <i>Re</i> (1979), 103 D.L.R. (3d) 105 (F.C.A.)	154
Irrarrazabal Olmedo, Ana Vilma, I.A.B.D. T80-9327, Sept. 22, 1980; affd. F.C.A.D. A-650-80, April 8, 1981	102
Ishac, Elias Iskandar, I.A.B.D. M77-1040, April 25, 1977	187
Islam, Muhammad Shahidul, I.A.B.D. M82-1278, C.L.I.C. Notes 72.5, June 4, 1984	82, 85
Ismailovski, Irfam, I.A.B.D. 75-10266, June 8, 1976	36

J

Jakubowski, Tadeusz, I.A.B.D. V79-6197, Oct. 4, 1979	120
Jankowski, Lech, I.A.B.D. V80-6410, C.L.I.C. Notes 26.11, Jan. 5, 1981	36, 39, 42, 145, 173
Jean-Philippe, Julner, I.A.B.D. 75-1081, Aug. 28, 1975	91
Jerez Spring, Angel Eduardo, v. M.E.I., F.C.A.D. A-361-80, Dec. 4, 1980; affg. I.A.B.D. M79-1170, C.L.I.C. Notes 21.9, May 26, 1980	154
Jiminez Ormeno Pizarro, Maria Angelica, I.A.B.D. V87-6004, Jan. 26, 1988; affd. (1990), 8 Imm. L.R. (2d) 223 (F.C.A.)	165
Jodlowski, Stanislaw Julian, I.A.B.D. V81-6166, June 18, 1981	42, 173
Jonaa, Muhieddine Abdul Wahab, I.A.B.D. T79-9032, C.L.I.C. Notes 7.17, May 8, 1979	188

K

Kamel, Victor Fathy, I.A.B.D. 79-1104, C.L.I.C. Notes 15.11, Aug. 1, 1979	180
Kang, Jiwan Kaur, I.A.B.D. V86-6183, April 13, 1987	147
Kantanka, Gabriel Sarfo, I.A.B.D. M87-1598X, Sept. 16, 1987	77
Kapur, Anil, I.A.B.D. T81-9450, Aug. 26, 1981	172
Katnoria Singh, Malkit, I.A.B.D. V84-6133, April 30, 1987	54
Kebede Fernandes, Almaz Isebella, I.A.B.D. 77-1036, Oct. 6, 1977	34
Khan, Omar, I.A.B.D. V80-6223, C.L.I.C. Notes 25.9, July 24, 1980	115
Khouri, Joseph, I.A.B.D. T82-9804, Oct. 2, 1984	44

Kifletsion, Tekeste, I.A.B.D. 79-1136, C.L.I.C. Notes 20.3, Feb. 29, 1980	34, 187
Komisarski, Henryk Stanley, I.A.B.D. V81-6162, May 28, 1981	42, 120, 173
Kovac v. I.N.S., 407 F. 2d 102 (9th Cir. 1969)	121
Kovar, Jiri (1973), 8 I.A.C. 226	63
Kroszkini, Edmund, I.A.B.D. 75-10374, Dec. 15, 1975	42
Kubi, Godfred Appiah, I.A.B.D. T87-9053, June 10, 1987	171
Kumar, Rajinder, I.A.B.D. T83-9484, March 31, 1987	53
Kwiatkowski v. M.M.I., [1982] 2 S.C.R. 856, 45 N.R. 116, 142 D.L.R. (3d) 385; affg. (1981), 34 N.R. 237 (F.C.A.); affg. on other grounds I.A.B.D. M79-1220, C.L.I.C. Notes 18.10, Dec. 13, 1979	76, 122

L

Laguerre, Geda, I.A.B.D. M87-1511X, Aug. 24, 1987	93
Laipenicks v. I.N.S., 750 F. 2d. 1427 (9th Cir. 1985)	220
Lazo Cruz, Jose Antonio, I.A.B.D. V80-6004, C.L.I.C. Notes 18.12, Jan. 16, 1980	175
Le, Thi Chien, I.A.B.D. 77-1099, June 20, 1977	63
Lee, Wai Chee, I.A.B.D. V87-6512X, Dec. 21, 1987	151
Lemoine Guajardo, Mauricio Esteban v. M.E.I., F.C.A.D. A-623-30, April 2, 1981; setting aside I.A.B.D. V80-6284, C.L.I.C. Notes 41.9, Dec. 1, 1981	150
Li, So Wo, I.A.B.D. V88-00066X, Sept. 23, 1988	177
Liedtke, Zdzislaw, I.A.B.D. V80-6383, Dec. 10, 1980	120
Ligas, Josef, I.A.B.D. 75-10390, Dec. 19, 1975	120
Lira Pastene, Raul Rodolfo, I.A.B.D. M79-1132, March 28, 1980 ..	153
Litter, Gizella, I.A.B.D. M77-1051, April 25, 1977	42
Litwinski, Jaroslaw Jozef, I.A.B.D. V81-6322, Oct. 8, 1981	120
Lottay Singh, Darshan, I.A.B.D. V86-6328, Feb. 4, 1987	203
Lugano v. M.M.I., [1976] 2 F.C. 438, 13 N.R. 322 (C.A.)	76
Lundy, Philomene, I.A.B.D. M87-1496X, Nov. 26, 1987	112

M

M.A. A26851062 v. I.N.S., 858 F. 2d 210 (4th Cir. 1989); revd. 899 F. 2d 304 (4th Cir. 1990)	181
Maejima, Miwako, I.A.B.D. 80-1072, June 5, 1980	56
Mahadeo, Ramesh, I.A.B.D. T83-10420, Dec. 20, 1983	91
Mahouachi, Mohamed Heidi, I.A.B.D. M84-1036, Sept. 11, 1986 ..	155
Majad, Malik Abdul, I.A.B.D. T76-9507, Dec. 17, 1976	53
Mak, Yim Shing, I.A.B.D. V87-6640X, May 17, 1988	85
Maldonado, Pedro Enrique Juarez v M.E.I., [1980] 2 F.C. 302, 31 N.R. 34 (C.A.)	44, 84, 187

Maldonado Verga, Maria Beatriz, I.A.B.D. 79-9002, C.L.I.C. Notes 6.16, March 22, 1979	71
Malek, Jerzy, I.A.B.D. 76-9092, March 10, 1976	42
Manasse, Joseph Alexis, I.A.B.D. M87-1634X, Sept. 9, 1987	167
Mangal, Nankisore, I.A.B.D. T82-9141, April 22, 1982	127
Mangra, Benaiserie, I.A.B.D. T83-10491, Jan. 5, 1984	143
Matuszewski, Andrzej, I.A.B.D. V80-6058; revd. on other grounds F.C.A.D. A-163-80, Sept. 30, 1980	120
Mazur, Jerzy, I.A.B.D. 76-9327, June 29, 1976	43
McMullen v. I.N.S., 658 F. 2d 1312 (9th Cir. 1981); 788 F. 2d 591 (9th Cir. 1986)	132, 174
Medina Aragon, Lionel, I.A.B.D. 77-1084, May 26, 1977	70, 87
Meghdessian, Zohrab Khoren, I.A.B.D. 79-1204, C.L.I.C. Notes 14.12, Nov. 21, 1979	186
Mena Ramirez, Luis Alberto, I.A.B.D. V86-6161, C.L.I.C. Notes 110.15, May 5, 1987	147, 184
Mensah, Jim Martin Kwesi, I.A.B.D. V79-6136, Aug. 7, 1979; revd. on other grounds F.C.A.D. A-527-79, May 2, 1980; affd. (1981), 36 N.R. 332 (<i>sub nom.</i> Mensah v. M.E.I.) (F.C.A.)	91, 115, 152
Meryse, Meril, I.A.B.D. M73-2608, April 30, 1975	36, 115, 152
Miller, Steven. <i>See</i> R. v. Immigration Appeal Tribunal, <i>ex parte</i> Steven Miller	
Mingot, Louis-Paul, (1973), 8 I.A.C. 351	70, 118, 170, 178
Miranda Cuellar, Jesus Antonio, I.A.B.D. 80-9204, C.L.I.C. Notes 26.9, Nov. 20, 1980	168
Mogharrabi, Matter of, Interim Decision 3028, U.S. Bd. of Imm. App., June 12, 1987	37
Mohamed, Serag Bozkal Mehmet, I.A.B.D. M83-1011, Jan. 25, 1983	72, 87
Mohan, Riknauth, I.A.B.D. T82-9251, May 4, 1982	85
Molina Riquelme, Mario Angel, I.A.B.D. 79-9363, C.L.I.C. Notes 22.6, July 9, 1980	85
Moly, Jean Maxene, I.A.B.D. M87-1836X, April 5, 1988	84
Morales, Jose Raul, I.A.B.D. V86-6277, April 16, 1987	198
Moreira, Jose Maria da Silva, I.A.B.D. T86-10370, April 8, 1987 ..	130
Moszczynski, Adam Bohdan, I.A.B.D. V87-6285, March 7, 1988 ..	152
Mouryoussef, Mascime, I.A.B.D. 80-1036, C.L.I.C. Notes 21.8, March 24, 1980	102
Mpagi, Joseph Maria, I.A.B.D. V80-6254, Aug. 13, 1980 ..	143, 146, 147
Muñoz Munizaga, Carlos Antonio, I.A.B.D. 79-9358, C.L.I.C. Notes 13.11, Nov. 1, 1979	193
Murugesu, Saam Yagasampanthar, I.A.B.D. M82-1142, July 13, 1982; revd. F.C.A.; accepted I.A.B.D. M82-1142, Sept. 30, 1983	127, 155, 177

- Mushtaq, Mohammad, I.A.B.D. M81-1122, C.L.I.C. Notes 47.6,
Oct. 26, 1982 34, 176
Musial, Marek, I.A.B.D. V80-6368, Nov. 19, 1980; *affd.* (1981), 38
N.R. 55 (*sub nom.* Musial v. M.E.T.) (F.C.A.) 88, 175, 183

N

- Nadarajah, Venkateswaran, I.A.B.D. T84-9662, March 18, 1986 ... 201
Nalliah, Monoranchitarassa, I.A.B.D. M84-1642, Oct. 20, 1987 86
Naredo Arduengo, Fernando Alfonso, I.A.B.D. T80-9159, C.L.I.C.
Notes 27.13, Nov. 20, 1980; *revd.* on other grounds (1981), 130
D.L.R. (3d) 752 (*sub nom.* Naredo and M.E.I., *Re*),
rejected by Board April 15, 1985 77, 87, 140, 156, 229
Narine, Azam Faceed, I.A.B.D. V79-6140, C.L.I.C. Notes 15.15,
Dec. 5, 1979 153, 175
Nassiribake, Shahram, I.A.B.D. V87-6134, April 23, 1987; *affd.* on
procedural grounds F.C.A.D. A-272-87, April 14, 1988 44, 155
Nuh, Gelil, I.A.B.D. T81-9273, July 5, 1981 58
Nuñez Veloso, Felix Salatiel, I.A.B.D. 79-1017, C.L.I.C. Notes
11.15, Aug. 24, 1979 108, 183, 194, 218

O

- Obeng Fosu, Gyeabour Stephen, I.A.B.D. V80-6032, Feb. 14, 1980;
affd. F.C.A.D. 81-A-12, Oct. 20, 1981 153
Olearczyk, Helena, I.A.B.D. M87-1897X, Feb. 9, 1988; *affd.*
(1990), 8 Imm. L.R. (2d) 18 (*sub nom.* Olearczyk v. M.E.I.)
(F.C.A.) 92, 120
Olguin Herrera, Hector Ivan, I.A.B.D. T80-9358, Oct. 14, 1980;
affd. [1981] 2 F.C. 801 (*sub nom.* Olguin v. M.E.I.) (C.A.) 91
Olszak, Jacek Marian, I.A.B.D. T87-9085X, Oct. 26, 1987 40
Opazo Opazo, Teresa del Carmen, I.A.B.D. V81-6067, March 5,
1981; *affd.* F.C.A.D. A-170-81, Sept. 24, 1981 179
Opuku-Gyamfi, Yaw, I.A.B.D. V80-6253, Aug. 13, 1980; *affd.* on
other grounds F.C.A.D. 80-A-67 73
Osorio Cruz, Zacarias, I.A.B.D. M88-20043X, C.L.I.C. Notes
118.6, March 25, 1988 182, 219
Ovakimoglu, Aram v. M.E.I. (1983), 52 N.R. 67 (F.C.A.); *revg.*
I.A.B.D. T82-9976, Jan. 25, 1983; *rejected* by Board Jan.
6, 1984 84, 122, 128
Owusu Ansah, Charles Kofi, v. M.E.I., F.C.A.D. A-1265-87, May
19, 1989; *revg.* I.A.B.D. T87-9386X, Nov. 10, 1987 49, 80
Oyarzo Marchant, Alfredo Manuel v. M.E.I., [1982] 2 F.C. 779
(C.A.) 88, 108, 121, 155
Ozdemir, Tezcan, I.A.B.D. M83-1304, C.L.I.C. Notes 77.12, Dec.
18, 1984 129

P

- Pacheco Martinez, Mauricio Eliseo, I.A.B.D. M87-1506X,
Sept. 9, 1987 92, 97
Parmar Singh, Mohinder, I.A.B.D. V87-6247X, Aug. 10, 1987 35
Penha, Francisco Jorge Carvalho, I.A.B.D. T87-9305X, Dec. 16,
1987 146
Perez Gomez, Jose del Rosario, I.A.B.D. M79-1179, June 2, 1980
..... 108, 113
Perez Medina, Roberto Luciano, I.A.B.D. M80-1078, C.L.I.C.
Notes 38.10, Sept. 9, 1981 194
Perlera-Escobar v. E.O.I.R., 884 F. 2d 1292 (11th Cir. 1990) 156
Permanand, Ganganee Janet, I.A.B.D. T87-10167, Aug. 10, 1987
..... 126, 142, 143
Permaul, Christolene, I.A.B.D. T83-9310, April 13, 1983;
previously considered (1983), 53 N.R. 323 (F.C.A.) 118, 153
Pers, Emil, I.A.B.D. M86-1634X, Feb. 17, 1987; *affd.* on other
grounds F.C.A.D. A-123-87, Jan. 12, 1988 150
Persaud, Harri Chandra, I.A.B.D. T84-9035, May 30, 1984 77
Pillmayer, Jenö, I.A.B.D. V84-6254, C.L.I.C. Notes 100.17, Nov.
20, 1986 48, 53
Pizarro Parada, Jorge, I.A.B.D. V87-6004, Jan. 26, 1988; *affd.* on
other grounds F.C.A.D. A-696-88, April 3, 1989 70, 71, 175
Plattform 'Artze Fur Das Legen' v. Austria, Series A, No. 139,
June 21, 1988, reported at (1988), 3(2) Interights Bulletin 19 132
Polak, Charles, I.A.B.D. 81-3009, April 23, 1981 127
Popovich, Slobodan, I.A.B.D. M76-1081, March 4, 1977 58
Pula, Matter of, Interim Decision No. 3033, U.S. Bd. of Imm.
App., Sept. 22, 1987 52

Q

- Quintanilla Ruiz, Guadalupe, I.A.B.D. V87-6662X, April 26, 1988 48
Quinteros Hernandez, Leonel Eduardo v. M.E.I., F.C.A.D.
A-506-81, Feb. 12, 1982; *revg.* I.A.B.D. V80-6192,
C.L.I.C. Notes 35.11, Aug. 18, 1981 and Jan. 31, 1985
..... 81, 83, 153, 156

R

- R. v. Immigration Appeal Tribunal, *ex parte* Steven Miller, [1988]
Imm. A.R. 1 46
R. v. Secretary of State for the Home Dept., *ex parte* Sivakuma-
ran, [1988] 1 All E.R. 193 (H.L.); *revg.* [1987] 3 W.L.R. 1047
(C.A.) 74, 78, 201
Rahman, Mahmuour, I.A.B.D. M86-1507X, Nov. 5, 1986 77

Rahman, Shafiqur Mohammed, I.A.B.D. M84-1073, C.L.I.C. Notes 74.4, Sept. 11, 1984	102
Rai Singh, Harbans, I.A.B.D. T82-9359, C.L.I.C. Notes 44.7, July 8, 1982	59
Rajanayagam, Arulverajah, I.A.B.D. M84-1390, Dec. 31, 1984	101, 129
Rajudeen, Zahirdeen v. M.E.I. (1985), 55 N.R. 129 (F.C.A.); revg. I.A.B.D. V83-6091, C.L.I.C. Notes 57.10, July 20, 1983	101, 129, 140, 188
Ramirez Cordero, Bernarda Lucia, I.A.B.D. M79-1211, C.L.I.C. Notes 28.10, Dec. 12, 1980	165
Ramirez Rojas, Roberto Osvaldo, I.A.B.D. M80-1010, Jan. 29, 1980	54
Ramkissoon, Jainarine Jerome, I.A.B.D. T84-9057, June 21, 1984	134, 143
Ramsarran, Naresh Persaud, I.A.B.D. T83-9371, April 25, 1983 and Feb. 4, 1985	124
Ramsingh, Cleopatra, I.A.B.D. M86-1138, Sept. 15, 1987	165
Rashid, Abdul, I.A.B.D. M87-1023X, April 16, 1987	148
Ravindiran, Ayadurai Gerard, I.A.B.D. V86-6067, March 26, 1987	70
Requena Cruz, Richard Cid, I.A.B.D. T83-10559, C.L.I.C. Notes 95.10, April 8, 1986; I.A.B.D. Feb. 8, 1984	159, 165, 202
Retamal Sanchez, Jesus Enrique, I.A.B.D. 79-1110, C.L.I.C. Notes 19.7, April 23, 1980	178
Reyes Ferrada, Luis Omar, I.A.B.D. T81-9476, Sept. 18, 1981; affd. F.C.A.D. A-572-81, May 31, 1982	49, 73, 102
Rina Rivera, Maria Alva, I.A.B.D. M85-1453, Sept. 22, 1987	155, 156
Robb, Dorothy, I.A.B.D. M84-1364, June 19, 1987	202
Rodrigues Salinas Araya, Maria Veronica, I.A.B.D. 76-1127, Jan. 6, 1977	112
Rodriguez-Coto, Matter of, Interim Decision 2985, U.S. Bd. of Imm. App., Feb. 21, 1985	175, 225
Roland, Fritz, I.A.B.D. M87-1587X, Nov. 9, 1987	126
Rosario Estrella, Manuel Antonio, I.A.B.D. M85-1097, C.L.I.C. Notes 83.13, Aug. 19, 1985	36
Rubin v. Paraguay, Case No. 9642, March 28, 1987, reported at (1987), 2 (3/4) Interights Bulletin 34	132
Rubio v. Colombia, Communication 161/1983, Nov. 2, 1987, reported at (1987), 2 (3/4) Interights Bulletin 36.1	132

S

Saddo, Mahmoud, I.A.B.D. M80-1123, July 24, 1980; revd. on other grounds F.C.A.D. A-574-80, Jan. 19, 1981; rejected by Board Feb. 25, 1981	48, 187
Sagoo Singh, Nirmal, I.A.B.D. T87-9841X, Jan. 13, 1988	201

Saini Singh, Baldev, I.A.B.D. T83-9050, March 21, 1985	201
Salamat, Moustafa, I.A.B.D. M86-1142, April 13, 1987	52
Salibian, Vajie v. M.E.I., F.C.A.D. A-479-89, May 24, 1990	97
Salvatierra Villarroel, Alfredo Nelson, I.A.B.D. T78-9173, Oct. 31, 1978; affd. on other grounds (1979), 31 N.R. 50 (<i>sub nom.</i> Villarroel v. M.E.I.) (F.C.A.)	48, 84
Sanchez Trujillo v. I.N.S., 801 F. 2d 1571 (9th Cir. 1986)	161, 162
Sandor, Maria, I.A.B.D. 79-9145, C.L.I.C. Notes 9.16, May 14, 1979	173
Sanes Suarez, Carlos Alberto, I.A.B.D. M86-1587X, Sept. 30, 1987	72, 90
Sangha Singh, Kinder, I.A.B.D. V87-6263X, Sept. 23, 1987	147
Satiacum, Robert, I.A.B.D. V85-6100, July 10, 1987; revd. F.C.A.D. A-554-87, June 16, 1989	77, 78, 130
Schtraks v. Government of Israel, [1964] A.C. 556 (H.L.)	174
Schwarz, Paul Valdez, I.A.B.D. 84-9787, C.L.I.C. Notes 84.8, March 17, 1987	155
Sévère, Marc Georges (1974), 9 I.A.C. 42	70, 71, 76, 101, 139, 152
Shahabaldin, Modjgan, I.A.B.D. V85-6161, March 2, 1987	155
Sharma, Rajinder Prashad, I.A.B.D. V82-6401, Jan. 27, 1984; revd. on other grounds F.C.A.D. A-1255-82, Jan. 27, 1984 ...	48, 52
Sheikh, Ashfaq Ahmad, I.A.B.D. 77-3021, Sept. 6, 1977; affd. on other grounds F.C.A.D. A-167-78, Oct. 27, 1980; revd. on other grounds [1981] 2 F.C. 161 (<i>sub nom.</i> Sheikh v. M.E.I.) (C.A.)	54, 56
Siedmiogrodzki, Mirosław Henryk, I.A.B.D. 80-1100, June 19, 1980	76
Silva, Bento Rodrigues da, I.A.B.D. T86-9740, Dec. 10, 1986	134, 147
Silva, Joao Machado da, I.A.B.D. T87-9612X, Oct. 5, 1987	147
Singh <i>et al.</i> v. M.E.I., [1985] 1 S.C.R. 177, 58 N.R. 1, 17 D.L.R. (4th) 422, 12 Admin. L.R. 137, 14 C.R.R. 13	77, 83
Singh, Ajit, I.A.B.D. T81-9741, Jan. 6, 1988	84
Singh, Ajit, I.A.B.D. T83-9208, Oct. 15, 1987	140
Singh, Darshan, I.A.B.D. T84-9443, Oct. 3, 1984	148
Singh, Jasbir, I.A.B.D. T83-9400, April 14, 1983	48, 73
Singh, Jaswant, I.A.B.D. T87-9326, Sept. 28, 1987	86
Singh, Jatinder, I.A.B.D. T83-10505, Feb. 26, 1986	153
Singh, Karnail, I.A.B.D. M83-1189, C.L.I.C. Notes 62.4, Nov. 14, 1983	134
Singh, Lottay, I.A.B.D. V84-6176, Feb. 11, 1988	84
Singh, Rajmati, I.A.B.D. T84-9608, Nov. 15, 1984	148
Singh, Swaran, v. M.E.I., F.C.A.D. A-1346-83, Dec. 3, 1984	81
Sivakumaran. <i>See</i> R. v. Secretary of State for the Home Dept., <i>ex</i> <i>parte</i> Sivakumaran	
Sivanesan, Karthigesu, I.A.B.D. M84-1513, Jan. 7, 1985	114

Sleiman, Mohammed Said, I.A.B.D. V79-6125, C.L.I.C. Notes 18.13, April 10, 1980; affd. F.C.A.D. A-437-80, Sept. 30, 1980	91, 186
Sokol, Matija, I.A.B.D. 77-3022, April 29, 1977	91
Srikanthan, Thillainathan, I.A.B.D. T83-10351, May 23, 1985	35
Staniszewski, Andrzej, I.A.B.D. M87-1024X, April 22, 1987.....	113
Stojka, Vladimir, I.A.B.D. 74-10198, Sept. 12, 1974.....	42
Suarez Cleito, Oscar, I.A.B.D. M81-1219, Dec. 8, 1981	71, 77
Suleiman, Munir Mohamad Adem, I.A.B.D. V81-6246, July 23, 1981; revd. on other grounds F.C.A.D., Oct. 6, 1982; rejected by Board Nov. 16, 1983.....	48, 71, 118, 127
Sumera, Radovan, I.A.B.D. V81-6161, May 28, 1981	145, 147
Surujpal, Khemraj v. M.E.I. (1985), 60 N.R. 73 (F.C.A.)	52, 129, 175
Sylvestre, Waldeck v. M.E.I., F.C.A.D. A-34-78, June 12, 1978 ...	87

T

Tegegne, Kidane, I.A.B.D. M80-1034, Feb. 25, 1981	34
Teklehaimanot, Abeba, v. I.A.B., F.C.A.D. A-730-79, Sept. 8, 1980.....	119
Thind Singh, Ranjit v. M.E.I., F.C.A.D. A-538-83, Nov. 27, 1983	84
Thomas, David Eugene, (1974), 10 I.A.C. 44	178
Toha Seguel, Luis Enrique, I.A.B.D. 79-1150, C.L.I.C. Notes 28.8, Nov. 13, 1980.....	82, 101, 108, 123, 165
Torres Quinones, Manuel Jesus, I.A.B.D. V81-6153, May 11, 1981; revd. on other grounds (1982), 45 N.R. 602 (<i>sub nom.</i> Quinones v. M.E.I.) (F.C.A.)	153
Torres Reyes, Manuel Jesus, I.A.B.D. 75-1063, Oct. 23, 1975; revd. on other grounds by F.C.A. Oct. 28, 1976; rejected by Board Dec. 20, 1976	140, 169
Tranco Arias, Victor Manuel, I.A.B.D. T84-9334, Feb. 5, 1986	86
Trujillo Barraza, Oscar, I.A.B.D. 77-9449, March 23, 1978.....	169
Tshibola, Pierre Katanku Tshiabu, I.A.B.D. M84-1074, May 30, 1985	142, 143

U

Urur, Mohamed Ahmed v. M.E.I., F.C.A.D. A-228-87, Jan. 15, 1988; affg. on other grounds I.A.B.D. M86-1601X, April 8, 1987.....	35
--	----

V

Val, Ruben Eduardo, I.A.B.D. T83-10592, Oct. 15, 1985	200
Valenzuela Ponce, Guillermo Sergio Francisco, I.A.B.D. 81-1231, C.L.I.C. Notes 38.12, Nov. 12, 1981	63

Valladares Escoto, Marco Antonio, I.A.B.D. T87-9024X, July 29, 1987	163, 184
Valverde Cerna, Francisco Edulfo, I.A.B.D. V87-6608X, March 7, 1988.....	86
Velasquez Rodriguez v. Honduras, Series C, No. 4, July 29, 1988, reported at (1989), 28 I.L.M. 291, 4(2) Interights Bulletin 21	132
Vera Jiminez, Pedro Ignacio, I.A.B.D. 81-9344, Nov. 12, 1981	123
Verma, Surinder Kumar, I.A.B.D. M82-1115, March 28, 1983; revd. F.C.A.D. A-481-83, Oct. 27, 1983	126
Veysey, Timothy v. Correctional Service of Canada (1989), 29 F.T.R. 74, 44 C.R.R. 364 (T.D.); affd. F.C.A.D. A-557-89, May 31, 1990.....	163

W

Wahba, Tarek Mohamed Shafey, I.A.B.D. V80-6033, C.L.I.C. Notes 17.9, Feb. 14, 1980	194
Washir Singh, Harbhajan, I.A.B.D. T79-9454, Dec. 7, 1982	73, 118, 127
Williams, Anthony Andre, v. M.E.I., F.C.A.D. A-57-81, June 16, 1981; revg. I.A.B.D. 81-9029, Jan. 28, 1981	89, 127

Y

Yaliniz, Tacir v. M.E.I. (1989), 7 Imm. L.R. (2d) 163 (F.C.A.)....	86
Yeboah, Nana Kwasi, I.A.B.D. T81-9165, C.L.I.C. Notes 42.9, May 11, 1982.....	176
Yilmaz, Nezihi, I.A.B.D. 80-9123, C.L.I.C. Notes 18.14, April 16, 1980.....	127

Z

Zariczniak, Jan Waclaw, I.A.B.D. T81-9160, C.L.I.C. Notes 31.11, April 24, 1981	148
Zastawny, Wladyslaw, I.A.B.D. 77-1125, July 2, 1977	101
Zavilla Bonilla v. I.N.S., 730 F.2d 562 (9th Cir., 1984)	96
Zbedat, Ebrahim, I.A.B.D. 86-9954, C.L.I.C. Notes 106.17, Oct. 30, 1986; affd. F.C.A.D. A-693-86, Oct. 8, 1987	83
Zubietta, Wilfredo Alejandro, I.A.B.D. 79-1034, C.L.I.C. Notes 14.10, Oct. 31, 1979	169, 193, 194